

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-216674

DATE: October 16, 1984

MATTER OF: Singer Safety Company

DIGEST:

1. Offeror which indicates in a "place of performance" clause that it will perform contract in a city which is in a labor surplus area, but which does not complete the "Eligibility For Preference As A Labor Surplus Concern" provision, is not entitled to labor surplus area evaluation preference because place of performance does not, under circumstances, establish that offeror is a labor surplus area concern.
2. Agency's acceptance of an offer that deviated from specifications provides no basis to sustain protest where protester submitted offer on same basis as did awardee so that no competitive prejudice accrued to protester as a result of the acceptance.

Singer Safety Company protests the rejection of its offer under request for proposals No. DLA400-84-R-6784 issued by the Defense General Supply Center, Defense Logistics Agency. Singer primarily complains of the agency's refusal to evaluate its offer on the basis of a preference for labor surplus area (LSA) concerns. Singer states that it would have been the low offeror and therefore the awardee if its proposal had been evaluated on the basis of the preference. We summarily deny the protest.

The solicitation contained a provision entitled "Eligibility For Preference As A Labor Surplus Concern," which stated:

"Each offeror deserving to be considered for award as a labor surplus area (LSA) concern . . . shall indicate below the address(es) where costs incurred on account of manufacturing or production . . . will amount to more than fifty percent . . . of the contract price. . . ."

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Space was then provided for the entry of the name and address of each such location. The provision included the following warning:

"CAUTION: Failure to list the location of manufacture or production and the percentage, if required, of cost to be incurred at each location will preclude consideration of the offeror as a LSA concern."

Singer did not fill out this eligibility provision, but asserts that it was nonetheless entitled to the LSA preference because it indicated in the "Place of Performance" clause that it intended to perform entirely at its Chicago location. Chicago, the protester states, is an LSA.

We have considered previously the situation presented when an offeror completes a place of performance clause but does not complete the LSA eligibility provision. In Chem-Tech Rubber, Inc., 60 Comp. Gen. 694 (1981), 81-2 CPD ¶ 232, we held that the bidder was not entitled to the LSA preference. We stated:

"This offer by Chem-Tech to perform the contract at its New Haven plant does not satisfy the requirements of the LSA eligibility clause set forth in paragraph K17 of the IFB. The place at which the contractor will perform may be immaterial with respect to the determination of whether the contractor is an LSA concern if costs greater than 50 percent of the contract price will be incurred for subcontracting or purchase of materials. Voss Industries, Inc., B-184258, Nov. 12, 1975, 75-2 CPD 298. We have specifically recognized, for example, that the cost of purchased materials is a cost of production which alone may be sufficient to qualify or disqualify a firm as an LSA; the determining factor is the location of the seller. See 41 Comp. Gen. 160, 164 (1961). It appears that significant portions of the production costs here were attributable to purchases of material and other non-manufacturing expenses."

On the other hand, in a later case involving the procurement of coats, with the cloth and buttons furnished to the contractor as government-furnished material, we held that the bidder was entitled to the preference because it was clear that a substantial portion of the contract costs would be for labor, so that the concerns expressed in Chem-Tech were not applicable. See South Jersey Clothing Co. et al., B-204531, et al., Feb. 4, 1982, 82-1 CPD ¶ 88.

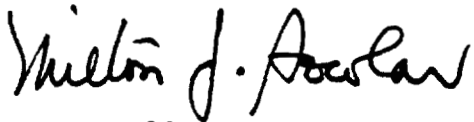
Here, the contractor is to furnish 1,005 welding screens. There is no indication that the government is furnishing materials for the manufacturing process, that this is essentially a labor services contract or that the concerns expressed in Chem-Tech are otherwise not applicable. We therefore have no basis to conclude that the contracting officer acted improperly in not affording Singer the LSA evaluation preference.

Singer also complains that the awardee offered a product that does not meet one of the specification provisions. Singer states that the acceptability of the awardee's deviating, lower-cost approach should have been made known so that offers could have been "more competitive."

It is generally improper, of course, for an agency to accept an offer that deviates from the specifications without revising the specifications to provide a common basis for competition. See, e.g., Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134; 52 Comp. Gen. 815 (1973). Here, however, the documents furnished by Singer indicate that Singer, anticipating the awardee's approach, submitted an alternate offer based on that same approach, and it is that alternate offer (\$1 lower than the awardee's unit price) to which Singer seeks to have the LSA preference applied. Obviously, Singer, the only protester on this procurement, and the awardee did compete on the same basis, and therefore Singer cannot be said to have been unfairly prejudiced by the acceptance of its competitor's offer. While we would anticipate that the agency will revise its specifications to reflect its actual needs before again procuring the items here in question, in the absence of prejudice to Singer we have no basis for sustaining the protest. See, e.g., H. Esmaili & Associates, Inc., B-198702, Oct. 9, 1980, 80-2 CPD ¶ 263.

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The protest is summarily denied.

for 
Comptroller General
of the United States